UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

JAMES P. MURPHY, Plaintiff, v. CONTINENTAL CASUALTY CO., RQ CONSTRUCTION, INC. et al., Defendants.	Civil No. 10cv513-W (CAB)
RQ CONSTRUCTION, INC., Counter-Claimant, v. JAMES P. MURPHY, Counter-Defendant.	**ORDER: (1) GRANTING RQ CONSTRUCTION INC.'S EX PARTE APPLICATION TO COMPEL DISCOVERY RESPONSES; AND (2) DENYING REQUEST FOR SANCTIONS** **[Doc. No. 35]**

Currently before the Court is RQ Construction, Inc.'s ("RQ Construction") motion to compel discovery responses and request for sanctions filed December 23, 2010. The Court ordered plaintiff and cross-defendant James P. Murphy ("Murphy") to respond to the motion on or before January 7, 2011, but he failed to do so. (Doc. No. 36.) Thus, the Court vacated the discovery hearing date of January 14, 2011 and took the matter under submission pursuant to Southern District of California Local Rule 7.1(d). For the reasons set forth below, the motion to compel is **GRANTED** and the request for sanctions is **DENIED without prejudice**.

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I. PROCEDURAL BACKGROUND

On March 10, 2010, Murphy filed a complaint for breach of contract and recovery on a Miller Act Payment Bond. [Doc. No. 1.] Defendants and counter-claimants Continental Casualty Company and RQ Construction answered and counterclaimed for breach of contract, reasonable value, intentional misrepresentation, express indemnity and breach of personal guarantee on April 6, 2002. (Doc. Nos. 4 and 5.) Counsel for Murphy withdrew on September 20, 2010, and he now represents himself. (Doc. No. 27.)

On September 29, 2010, RQ Construction served Requests for Admission and Requests for Production of Documents on Murphy. (Doc. No. 35-2, p. 2, ¶ 2.) The Court held a Mandatory Settlement Conference on October 22, 2010 at which Murphy, a representative from RQ Construction and counsel for RQ Construction, Nowell Lantz, appeared. At the conference, the Court discussed outstanding discovery with the parties. The Court extended Murphy's deadline for responding to the outstanding discovery due to the recent withdrawal of his prior counsel and ordered Murphy to respond to the discovery by November 22, 2010. (Doc. No. 34.) Counsel for RQ Construction sent a complete set of the outstanding discovery to Murphy on October 22, 2010. (Doc. No. 35, p. 2, ¶ 4.)

Murphy failed to provide discovery responses by November 22, 2010. (Doc. No. 35-2, p. 2, ¶ 5.) On December 23, 2010, RQ Construction filed an ex parte application to compel responses to discovery and for sanctions in the amount of $4,645 for costs and attorneys' fees incurred bringing the motion. (Doc. No. 35.) RQ Construction then filed a notice of non-opposition on January 10, 2011, as Murphy had not filed a response to the motion (Doc. No. 37.)

II. DISCOVERY RESPONSES

A party may serve a request for production of documents or a request for admissions on any other party pursuant to Federal Rules of Civil Procedure 34 and 36. The receiving party must respond to the requests in writing within 30 days or as ordered by the Court or stipulated by the parties. FED. R. CIV. PROC. 34(b)(2)(A) and 36(a)(3).

RQ Construction served Murphy with Requests for Production and Requests for Admission pursuant to the Federal Rules of Civil Procedure. (Doc. No. 35-2, p. 2, ¶¶ 2, 4.) After the response deadline imposed by the Court expired, counsel for RQ contacted Murphy to inquire about the responses. (Doc. No. 35-3, p. 2, ¶¶ 3-7.) Murphy informed counsel that he would be emailing the responses to counsel. (*Id.*) Murphy has not done so. (*Id.* at ¶ 7.) RQ Construction is entitled to a response to those requests within the time limit set by the Court. FED. R. CIV. PROC. 34(b)(2)(A) and 36(a)(3). Therefore the Court **GRANTS** the motion to compel further responses and **HEREBY ORDERS** Murphy to provide written responses to the Requests for Production and Requests for Admission (Doc. No. 39 at Exs. 1 and 2) on or before **February 1, 2011.**

III. REQUEST FOR MONETARY AND TERMINATING SANCTIONS

Pursuant to Rule 37(a)(5), a court may award reasonable expenses incurred in moving to compel if the motion is granted. Additionally, a court may sanction a party for failing to obey an order to provide or permit discovery. The possible sanctions include: (1) issue establishment; (2) evidence or issue preclusion; (3) striking pleadings, dismissing the action, or rendering a default judgment against the disobedient party; (4) staying proceedings until the order is obeyed; or (5) treating disobedience as contempt. FED. R. CIV. PROC. 37(b)(2).

RQ Construction argues that it is entitled to monetary sanctions as Murphy's conduct was not substantially justified since he is required to respond and was aware of the deadline. (Doc. No. 35-1, p. 3.) RQ Construction contends Murphy was told of the response deadline at the in-person Mandatory Settlement Conference and acknowledged the deadline. (*Id.*) Therefore, RQ Construction requests reasonable expenses incurred in bringing this motion. (*Id.* at p. 4.)

Additionally, RQ Construction requests terminating sanctions arguing Murphy has willfully disregarded the discovery process and Court orders. (*Id.* at p. 4-5.) RQ Construction further contends that terminating sanctions are appropriate because it has been significantly prejudiced by Murphy's failure to provide responses. (*Id.* at pp. 5-6.) Specifically, RQ Construction states it has been prevented from preparing its defenses. (*Id.*)

The Court declines to issue monetary or terminating sanctions at this time. The Court, however, finds that Murphy has violated three court orders by: (1) failing to appear for the Status Conference on October 8, 2010 (Doc. No. 30); (2) failing to provide responses to discovery by November 22, 2010 (Doc. No. 34); and (3) failing to respond to the motion to compel (Doc. No. 36). The Court advises Murphy that any additional failure to follow the Court's orders or the discovery rules will result in sanctions, such as monetary sanctions or dismissal of plaintiff's action and entry of default judgment for defendant on its counterclaims. Therefore, the Court **DENIES** RQ Construction's request for sanctions **without prejudice**.

IV. CONCLUSION

Based on the foregoing, the motion to compel discovery responses is **GRANTED** and the request for sanctions is **DENIED** without prejudice. Accordingly, IT IS HEREBY ORDERED:

1. Murphy shall provide responses to the Requests for Admission and Requests for Production (Doc. No. 39 at Exs. 1 and 2) on or before **February 1, 2011**.

2. The Status Conference set for January 24, 2011 at 9:30 a.m. to address a further settlement conference is vacated.

3. A Status Conference regarding discovery is set for **February 8, 2011** at **1:30 p.m.** The conference shall be telephonic. Counsel for defendants and counter-claimants shall coordinate and initiate the conference call.

DATED: January 18, 2011

CATHY ANN BENCIVENGO
United States Magistrate Judge